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# IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

**WALTER P. MAXWELL,**

*Petitioner,*

**V.**

**E-SYSTEMS, INC.,**

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Does proof of a prima facie case of discrimination under the Age Discrimination In Employment Act under the judicially-created proof scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) require a demonstration that the claimant has been replaced by someone under the age of 40 years, as opposed to proof of replacement by a significantly younger individual?

2. May the factual testimony of an employment discrimination plaintiff, standing alone, suffice to prove that an employer's asserted rationale for adverse action is untrue, and a mere pretext for discrimination, sufficient to defeat a motion for summary judgment?

3. Does an employer's stated intention to select a demoted plaintiff's replacement based, at least in part, on the younger age of the replacement selected constitute evidence of discriminatory intent, sufficient to defeat a motion for summary judgment?

## PARTIES TO THE PROCEEDING

The names of all of the parties to this proceeding appear in the caption of the case.

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . . i

PARTIES TO THE PROCEEDING . . . . . ii

TABLE OF CONTENTS . . . . . iii

TABLE OF AUTHORITIES . . . . . v

OPINIONS DELIVERED IN THE CASE . . . . 1

STATEMENT OF JURISDICTION IN THIS COURT . . . . . 2

STATUTES INVOLVED IN THE CASE . . . . 3

STATEMENT OF THE CASE . . . . . 4

ARGUMENT . . . . . 7

I. THE LOWER COURT ERRONEOUSLY CONCLUDED THAT PROOF OF A PRIMA FACIE AGE DISCRIMINATION CASE USING THE McDONNELL DOUGLAS PARADIGM REQUIRES PROOF THAT THE CLAIMANT HAS BEEN REPLACED BY SOMEONE UNDER THE AGE OF FORTY, RATHER THAN REPLACEMENT BY A SUBSTANTIALLY YOUNGER INDIVIDUAL . . . . . 7

II. THE LOWER COURT ERRONEOUSLY CONCLUDED THAT NO REASONABLE JURY COULD HAVE CREDITED THE FACTUAL TESTIMONY OF MR. MAXWELL AS TO THE PREDICATE INCIDENT WHICH LED TO HIS DEMOTION . . . . . 12

III. THE LOWER COURT ERRONEOUSLY HELD THAT THE COMPANY'S SELECTION OF MR. MAXWELL'S REPLACEMENT BASED ON THE REPLACEMENT'S AGE COULD NOT CONSTITUTE EVIDENCE OF INTENT TO DISCRIMINATE ON THE BASIS OF AGE . . . . . 17

CONCLUSION . . . . . 19

APPENDIX

## TABLE OF AUTHORITIES

**Cases**


Barnes v. Gencorp, Inc., 896 F.2d 1457 (6th Cir.), cert. denied, 498 U.S. 878, 112 L.Ed.2d 171, 111 S.Ct. 211 (1990) . . . . . 11

Bienkowski v. American Airlines, Inc., 851 F.2d 1503 (5th Cir. 1988) . . . 11

Blum v. Witco Chemical Corp., 829 F.2d 367 (3d Cir. 1987) . . . . 11

Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989) . . . . . 11

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) . . . . . 12

Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544 (10th Cir. 1988) . . . 11

Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981) . . . . . 11

Endres v. Helms, 617 F. Supp. 1260 (D.D.C. 1985) . . . . . 11

Freeman v. Package Machinery Corp., 865 F.2d 1331 (1st Cir. 1988) . . . . 10

Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir.), cert. denied, 474 U.S. 1006, 106 S.Ct. 525, 88 L.Ed.2d 457 (1985) . . . . . 11

Haskell v. Kaman Corp., 743 F.2d 1132 (2d Cir. 1984) . . . . . 11

Kralman v. Illinois Department of Veterans' Affairs, 23 F.3d 150 (7th Cir.), cert. denied, ___ U.S. ___, 130 L.Ed.2d 213, 115 S.Ct. 359 (1994) . . . . . 11

LaPointe v. United Autoworkers Local 600, 8 F.3d 376 (6th Cir. 1993) . . 11

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) . . . . . 9, 10

Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) . 8, 9, 10

Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985), cert. denied, 474 U.S. 1057, 88 L.Ed.2d 773, 106 S.Ct. 796 (1986) . . . . . 11

McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980) . . . . 11

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) . . . . i, 5, 7, 9

Miller v. Lyng, 660 F. Supp. 1375 (D.D.C. 1987) . . . . . 11

Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993) . . . . 10

O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542 (4th Cir. 1995), petition for cert. filed (August 29, 1995) . . . . . 10

Reinhart v. City of Independence, 35 F.3d 1263 (8th Cir. 1994), cert. denied, ___ U.S. ___, 131 L.Ed.2d 744, 115 S.Ct. 1822 (1995) . . . . . 11

Sailor v. Hubbell, Inc., 4 F.3d 323 (4th Cir. 1993) . . . . . 10

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) . . . . . 13, 16

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981) . . . . . 7, 9

Ware v. Howard University, Inc., 816 F. Supp. 737 (D.D.C. 1993) . . . 11

Other Authorities

29 C.F.R. § 1625.2(a) . . . . . 12

28 U.S.C. § 1254(1) . . . . . 2

28 U.S.C. § 1291 . . . . . 2

28 U.S.C. § 1331 . . . . . 4

28 U.S.C. § 1343 . . . . . 4

29 U.S.C. § 626(c)(1) . . . . . 4

29 U.S.C. § 632(a)(1) . . . . . 3

S. Ct. Rule 10.1(a) . . . . . 7

## OPINIONS DELIVERED IN THE CASE

The Opinion of the Court of Appeals is unreported, save as a table case. Maxwell v. E-Systems, Inc., 60 F.3d 823 (4th Cir. 1995). The opinion is reported unofficially on the LEXIS system, at 1995 U.S.App.LEXIS 16457 (4th Cir. July 5, 1995).

The Memorandum Opinion of the district court is not reported. Maxwell v. E-Systems, Inc., C.A. No. 93-1518-A (E.D. Va. June 13, 1994).

## STATEMENT OF JURISDICTION IN THIS COURT

The opinion of the Court of Appeals in this matter was issued on July 5, 1995. No petition for rehearing, or motion for an extension of time for filing a Petition for Certiorari, has been filed.

This Court has jurisdiction to consider this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1). The Order of the district court granting summary judgment was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

## STATUTES INVOLVED IN THE CASE

This Petition involves the proper interpretation of the Age Discrimination In Employment Act of 1967, 29 U.S.C. §§ 621 et seq., and in particular of Section 3(a)(1) of that Act, which provides:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 632(a)(1).

## STATEMENT OF THE CASE

This civil action was brought by plaintiff Walter Maxwell against his employer, E-Systems, Inc. ("E-Systems"), under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (the "ADEA").[1] The district court had jurisdiction of Mr. Maxwell's claims under the ADEA in the first instance pursuant to 29 U.S.C. § 626 c)(1), 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

Mr. Maxwell is 63 years old. At the time of the events giving rise to this litigation, Mr. Maxwell had been employed by E-Systems for twenty-two years. Mr. Maxwell was a supervisor, and a field site supervisor for a classified government project code-named CARDINAL.

After an incident involving the removal of a failed "test unit" device at the CARDINAL field site in early 1993, in which E-Systems contends Mr. Maxwell damaged the failed test unit, Mr. Maxwell was re-assigned, demoted, and suffered a $10,000 per year loss in salary due to the loss of his supervisory position.

Mr. Maxwell's supervisory responsibilities were assumed by Mr. Frank Ascensio, who at the time was

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[1] A separate claim under the employment discrimination provisions of the Americans With Disabilities Act of 1990 was asserted, but is not the subject of this Petition.

32 years of age. Mr. Ascensio had been hired by E-Systems before the incident involving the test unit, with the express intention of replacing Mr. Maxwell. Mr. Maxwell's field responsibilities were assumed by Mr. Larry Coughenour, who was 53 years of age.

After the close of discovery, the United States District Court for the Eastern District of Virginia, Alexandria Division, Hon. Claude M. Hilton presiding, granted summary judgment in favor of E-Systems and against Mr. Maxwell.[2]

The district judge held that Mr. Maxwell was not able to state a prima facie case of discrimination under the judicially-created proof system of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). The sole rationale for the district court's decision was the assumption of part of Mr. Maxwell's duties -- although not all of those duties -- by Mr. Coughenour, who was over the age of 40 although substantially younger than Mr. Maxwell. As the district court reasoned, Mr. Maxwell could not prove that he was replaced in his former position by someone outside the protected class under the ADEA, and therefor had not demonstrated a prima

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[2]The Memorandum Opinion of the district court, issued on June 13, 1994 after the filing of the Notice Of Appeal, is reproduced in its entirety in the Appendix.

facie case. Memorandum Opinion at 5.

The Court of Appeals affirmed the decision of the district court, but did so on grounds not discussed or relied on by the district court.[3] Rather, the Court of Appeals found that Mr. Maxwell did not produce sufficient evidence "as would permit a reasonable person to conclude that the units were not seriously damaged during the retrievals or that Maxwell was not responsible." Opinion at 7.

Mr. Maxwell testified that any "damage" to the already-inoperative test unit was inconsistent with that damage being caused by Mr. Maxwell's operation. Mr. Maxwell also testified that the unidentified customer was not upset at the incident. The company's report of the incident, prepared by Mr. Maxwell's supervisor, concluded that further disciplinary action was inappropriate. Nonetheless, the Court of Appeals held that "Maxwell's unsupported allegations are not sufficient to create a genuine issue in regard to what caused the damage [to the CARDINAL] test unit, what damage was caused, and how the customer reacted." Opinion at 7.

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[3]While the opinion of the Court of Appeals states that the "district court granted summary judgment to E-Systems on alternative bases," Opinion at 4, a brief review of the district court's Memorandum Opinion discloses that this is plainly incorrect.

## ARGUMENT

### I. THE LOWER COURT ERRONEOUSLY CONCLUDED THAT PROOF OF A PRIMA FACIE AGE DISCRIMINATION CASE USING THE McDONNELL DOUGLAS PARADIGM REQUIRES PROOF THAT THE CLAIMANT HAS BEEN REPLACED BY SOMEONE UNDER THE AGE OF FORTY, RATHER THAN REPLACEMENT BY A SUBSTANTIALLY YOUNGER INDIVIDUAL

In contrast to the law of every other Circuit, the Fourth Circuit stands alone in requiring that, as a matter of law, proof of a prima facie case of age discrimination under the judicially-created McDonnell Douglas/Burdine paradigm[4] requires a demonstration that the claimant has been replaced by an individual under the age of 40. It would be appropriate for this Court to grant the Petition for Certiorari to resolve this conflict on this important issue between the Court of Appeals of the Fourth Circuit and the several other Court of Appeals. S. Ct. Rule 10.1(a).

It was error for the district court to grant the motion for summary judgment

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[4]Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). See St. Mary's Honor Center v. Hicks, ___ U.S. ___, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993).

on this ground, although the district court's determination is consistent with the law of the Fourth Circuit. Judge Hilton held:

> The parties do not dispute the first three elements [of the prima facie case]. However, Maxwell is unable to meet the fourth element. . . . The fourth element of the test is not satisfied if the plaintiff was replaced by an individual over 40 years old, even if that individual is younger than the plaintiff.

Memorandum Opinion at 5.

The earliest decision from the Court of Appeals for the Fourth Circuit on this issue correctly characterized the law on this issue, albeit in dictum. In Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982), the Court of Appeals wrote:

> The trial judge intimated some concern that perhaps no violation was established as a matter of law because the evidence showed that the claimant was not replaced by a person outside the protected age group. Defendant conceded on oral argument that on current authority this does not constitute an independent basis for the judgment. . . . We agree that this is not an essential legal element of the

ADEA claim. . . .

681 F.2d at 237-38 n.5. Rather, as that earlier Fourth Circuit decision framed the issue:

> [a]n ADEA claim involving replacement by another does not require as a matter of law proof that the other was outside the protected age group. But absolute and relative ages of the claimant and his replacement have obvious relevance in assessing whether a factual inference of age discrimination is permissible. We agree with the First Circuit that:
>
> Replacement of a 60 year old by a 35 year old or even a 45 year old within the protected class would be more suggestive of discrimination than replacement of a 45 year old by a 42 year old within the protected class or by a 39 year old outside it.

681 F.2d at 242-43 n.13, quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979).

The discussion in Lovelace accurately characterized the law, but the Fourth Circuit soon abandoned this view.

In a series of cases in the early 1990s, the Court of Appeals erroneously formulated the fourth element of the McDonnell Douglas/Burdine prima facie

case in ADEA actions as the replacement of the plaintiff by someone outside of the protected class, i.e., someone under age 40.[5] In none of these cases did the Court of Appeals discuss the rationale for this formulation of the prima facie case, or indeed even acknowledge the Court's shift from its earlier conclusion in Lovelace. It was not until June of this year, shortly before the decision in Mr. Maxwell's case was announced, that the Court of Appeals decided O'Connor v. Consolidated Coin Caterers Corp., 56 F.3d 542 (4th Cir. 1995), petition for cert. filed (August 29, 1995), in which the theory that led to the dismissal of Mr. Maxwell's claim was articulated and explained by the Fourth Circuit. In Consolidated Coin, Senior Circuit Judge Butzner wrote separately to emphasize that the Fourth Circuit's formulation of such an "absolute requirement . . . has no justification in law or policy. . . . The Act contains no language permitting employers to favor a younger employee over an older one on the basis of age simply because the younger employee is within the protected age group."

The Circuits are clearly divided on this issue, with the Fourth Circuit standing alone. See, e.g., Freeman v. Package Machinery Corp., 865 F.2d 1331 1335 n.2 (1st Cir. 1988); Loeb v. Textron, Inc., 600 F.2d 1003, 1319 n.9

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[5]See, e.g., Sailor v. Hubbell, Inc., 4 F.3d 323 (4th Cir. 1993); Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993).

(1st Cir. 1979); Haskell v. Kaman Corp., 743 F.2d 113, 122 (2d Cir. 1984); Maxfield v. Sinclair International, 766 F.2d 788, 792-93 (3d Cir. 1985), cert. denied, 474 U.S. 1057, 88 L.Ed.2d 773, 106 S.Ct. 796 (1986); Blum v. Witco Chemical Corp., 829 F.2d 367, 372 (3d Cir. 1987); McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980); Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1506 (5th Cir. 1988); Barnes v. Gencorp, Inc., 896 F.2d 1457, 1466 (6th Cir.), cert. denied, 498 U.S. 878, 112 L.Ed.2d 171, 111 S.Ct. 211 (1990);[6] Kralman v. Illinois Department of Veterans' Affairs, 23 F.3d 150, 154-55 (7th Cir.), cert. denied, ___ U.S. ___, 130 L.Ed.2d 213, 115 S.Ct. 359 (1994); Reinhart v. City of Independence, 35 F.3d 1263, 1265-66 (8th Cir. 1994), cert. denied, ___ U.S. ___, 131 L.Ed.2d 744, 115 S.Ct. 1822 (1995); Douglas v. Anderson, 656 F.2d 528, 532-33 (9th Cir. 1981); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir. 1988); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1444 (11th Cir.), cert. denied, 474 U.S. 1006, 106 S.Ct. 525, 88 L.Ed.2d 457 (1985); Carter v. City of Miami, 870 F.2d 578, 582-83 (11th Cir. 1989); Ware v. Howard University, Inc., 816 F. Supp. 737, 750 (D.D.C. 1993); Miller v. Lyng, 660 F. Supp. 1375, 1378 n.2 (D.D.C. 1987); Endres v. Helms,

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[6]But see LaPointe v. United Autoworkers Local 600, 8 F.3d 376 (6th Cir. 1993) (ADEA plaintiff could not state a prima facie case unless the plaintiff was replaced by someone under 40).

617 F. Supp. 1260, 1266-67 (D.D.C. 1985).

The interpretative regulations issued by the U.S. Equal Employment Opportunity Commission also note that it is unlawful for an employer in any way to give "preference because of age between individuals 40 and over." 29 C.F.R. § 1625.2(a) (emphasis added). "Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age. . . ." Id. This interpretation is entitled to deference. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

This Court should issue a writ of certiorari in this case to resolve this conflict among the Circuit Courts of Appeals.

## II. THE LOWER COURT ERRONEOUSLY CONCLUDED THAT NO REASONABLE JURY COULD HAVE CREDITED THE FACTUAL TESTIMONY OF MR. MAXWELL AS TO THE PREDICATE INCIDENT WHICH LED TO HIS DEMOTION

Although the district court did not address the issue, the Court of Appeals held that summary judgment for E-Systems was appropriate because "Maxwell's unsupported allegations" were insufficient to support the inference that the damage to the test unit did not occur as claimed by E-Systems. As the Court of Appeals framed the issue, "Mere

speculation or the building of one inference upon another" does not create a genuine issue of fact. Opinion at 7. This was error.

This Court is justifiably reluctant to grant certiorari to correct rulings based on factual errors in the lower courts. However, in this case, question at hand is a legal one: what quantum of evidence is necessary to survive summary judgment in an employment discrimination case, where the key issues are motive and intent and where direct evidence of discriminatory animus is almost never present?

This is precisely the issue which so concerned the four dissenting members of this Court in St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), where Justice Souter warned of "summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence." 113 S.Ct. at 2763.

While the Court of Appeals derogated Mr. Maxwell's "unsupported allegations" which countered E-Systems' contentions, even uncorroborated "allegations" by a party are -- if they take the form, as they did in this case, of sworn and competent testimony as to factual observations -- sufficient to withstand summary judgment. A party may build his case on his own testimony. Mr. Maxwell did not merely "speculate" as to the

issues surrounding E-Systems' offered justification for his demotion. Rather, he offered highly probative sworn testimony and other direct evidence:

- That E-Systems' customer agreed that Mr. Maxwell had been doing the right thing, was not upset, and appeared sympathetic.[7]

This sworn evidence directly controverted the conclusion of the Court of Appeals that Mr. Maxwell could not "create a genuine issue in regard to . . . how the customer reacted."

- That after the January 1993 incident, E-Systems was awarded a two-year extension of the contract by this customer.[8] Again, this evidence directly controverted the conclusion of the Court of Appeals that Mr. Maxwell could not "create a genuine issue in regard to . . . how the customer reacted."

- That several witnesses testified to E-Systems' intention to replace Mr. Maxwell with the 32-year-old Mr. Ascensio two years prior to the "test unit" incident, and than an abortive attempt to effect the replacement was

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[7]Appendix Three, ¶4(a).

[8]Appendix Three, ¶ 4(b).

abandoned when the customer vehemently complained.[9]

- That none of the other E-Systems employees involved in the incident, or in other similar test unit installation failures, had ever been disciplined.

- That both Mr. Maxwell and his supervisor, John Hale, believed that any damage done to the test unit was minor, and that the incident neither caused substantial damage nor significantly obscured the pre-existing damage which required removal of the test unit in the first place.[10]

- That, despite the Court of Appeals' conclusion that Mr. Maxwell was at fault for not using proper procedures, the E-Systems' incident memorandum concluded that "[p]roper procedures were being used."[11]

The lower courts in this case simply misconceived the quantum of evidence sufficient to permit this case to be

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[9]Appendix Three, ¶ 5.

[10]Appendix Three, ¶ 2.

[11]Appendix Three, ¶ 2.

tried to a jury. In St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), this Court held that a Title VII plaintiff is not entitled to judgment as a matter of law merely by proving a defendant's proffered explanation is pretextual. However, this Court was careful to note that evidence of pretext may also provide evidence from which a finder of fact may infer discriminatory intent:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals [below] was correct when it noted that, upon such rejection, 'no additional proof of discrimination is required.'

113 S.Ct. at 2749. On this record, it was error to award summary judgment to E-Systems on this issue.

## III. THE LOWER COURT ERRONEOUSLY HELD THAT THE COMPANY'S SELECTION OF MR. MAXWELL'S REPLACEMENT BASED ON THE REPLACEMENT'S AGE COULD NOT CONSTITUTE EVIDENCE OF INTENT TO DISCRIMINATE ON THE BASIS OF AGE

Mr. Maxwell offered direct evidence that age motivated E-Systems in making employment decisions relating to his position. In deciding to make the younger Mr. Coughenour site leader, E-Systems considered but rejected the alternative of replacing Mr. Maxwell with a more experienced, albeit older, employee, Stan Scalsky, even though (as Mr. Maxwell testified) Mr. Scalsky was "much more qualified" than Mr. Coughenour.

Mr. Scalsky was rejected as Mr. Maxwell's replacement by E-Systems because of Scalsky's age. Both Mr. Maxwell and Mr. Maxwell's supervisor, Mr. Hale, testified to this effect at deposition.[12]

It also bears noting that the memorandum prepared by Mr. Maxwell's supervisor, John Hale, expressly counseled against additional disciplinary action because "Walt is, frankly speaking, in the 'retirement age category.' . . . Further personnel action may 'encourage' Walt to retire which, in the writer's opinion, is

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[12]Appendix Three, ¶ 3.

neither in the best interest of the CARDINAL O&M program, nor is it in the best interest of our Government Customer."[13] Nonetheless, after receiving this warning, E-Systems imposed further discipline on Mr. Maxwell.

The Court of Appeals dismissed this evidence of age-related motivation on the part of E-Systems with the observation that it "amounts to no more than [Maxwell's] subjective belief . . . of discriminatory intent." Opinion at 8. This was error; taken together, Mr. Maxwell presented sufficient evidence of direct, age-related animus to survive summary judgment.

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[13]Appendix Three, ¶ 2.

## CONCLUSION

Petitioner Walter Maxwell respectfully requests that his Petition be granted, and that a writ of certiorari issue in this cause.

October 3, 1995
Respectfully submitted,

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